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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1234WMS

United States of America,	*	
	*	
Appellant,	*	
	*	Appeal from the
v.	*	United States
	*	District Court for
Susan D. Bieri, et al.,	*	the Western
	*	District of
Appellees.	*	Missouri

ORDER

Appellees' motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 3/6/96. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

December 20, 1995

Order Entered at the Direction of the Court:
(/S/ Michael E. Gans)
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1234WMS

United States of America,	*	
	*	
Appellant,	*	
	*	Order Denying
v.	*	Petition for
	*	Rehearing and
Susan D. Bieri, et al.,	*	Suggestion for
	*	Rehearing En
Appellees.	*	Banc

The suggestion for rehearing en banc is denied. Chief Judge Arnold, Judge McMillian, Judge Beam, Judge Loken, and Judge Murphy would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

December 7, 1995

Order Entered at the Direction of the Court:

(/S/ Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1234WMS

United States of America,	*	
	*	
Appellant,	*	Appeal from the
	*	United States
vs.	*	District Court for
	*	the Western
Susan D. Bieri; Leonard Bieri, III	*	District of
	*	Missouri
Appellees.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

October 13, 1995

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-1234

United States of America,	*
	*
Plaintiff-Appellant,	*Appeal from the
	*United States
v.	*District Court for
	*the Western
Susan D. Bieri;	*District of
Leonard D. Bieri, III,	*Missouri.
	*
Defendants-Appellees.	*

Submitted: June 15, 1995
Filed: October 13, 1995

Before WOLLMAN, JOHN R. GIBSON, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

This is an appeal after remand of a criminal forfeiture case under 21 U.S.C. § 853(a)(2) (requiring forfeiture of the whole of a person's property when that person used any part or all of it to commit or to facilitate drug trafficking offenses). In our prior opinion, we reversed the district court's order to forfeit only part of the Bieris' farm and remanded for further

proceedings, concluding that the whole farm should be forfeited unless on remand the district court found that forfeiture of the whole violates the Excessive Fines Clause of the Eighth Amendment. *See United States v. Bieri*, 21 F.3d 819 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994). On remand, the district court ordered no forfeiture, and the government now appeals. We reverse and remand with directions to the district court to enter an order forfeiting the entire farm.

I. Background.

Susan and Leonard Bieri were charged in count I, count II, and count III of a superseding indictment with federal drug trafficking and firearm offenses and were charged in count IV with using real property to commit or to facilitate their drug trafficking offenses (criminal forfeiture). Following a bench trial, the district court convicted the Bieris on counts I and II (the drug trafficking offenses). We affirmed the Bieris' convictions and sentences on appeal. *See Bieri*, 21 F.3d at 825.

The district court also ordered criminal forfeiture of some of the real property charged in count IV, specifically finding that the parcel of land where the defendants' house and barn are located (tract four of the four-tract dairy farm) was used to commit or to facilitate the commission of the Bieris' drug trafficking offenses. See 21 U.S.C. § 853 (a)(2). The district court ordered forfeiture of only tract four. In a separate appeal, we reversed the district court's order of forfeiture and remanded for further proceedings. *United States v. Bieri*, 21 F.3d 819 (8th Cir.), *cert. denied*, 115 S. Ct. 208 (1994). We noted that section 853(a)(2) mandates forfeiture of the whole "property" if any part of it is used to commit or to facilitate the

drug trafficking offense. *Id.* at 823. We then determined that "property under section 853(a)(2) is best defined not by historic land descriptions, but by the instruments that created the defendant's interest in the property. *Id.* at 823-24. Because the Bieris acquired the whole, four-tract, contiguous farm at a single time and in a single instrument, we concluded that the farm is one piece of "property" for purposes of criminal forfeiture and that the district court erred by considering each historically-described tract separately. *Id.* at 824. We held that section 853(a)(2), in this case, mandates forfeiture of the entire farm because part of it was used to commit or to facilitate a drug trafficking offense. *Id.*

We also noted in our prior opinion that criminal forfeiture is a fine within the meaning of the Eighth Amendment's Excessive Fines Clause. *Id.* (citing *Alexander v. United States*, 113 S. Ct. 2766, 2775-76 (1993)). Accordingly, we determined that the district court must consider whether the criminal forfeiture amounts to an excessive fine; the district court could order forfeiture of less than the whole if necessary to tailor the forfeiture "to fit within the broad boundaries of constitutional proportionality." *Id.* In conclusion, we provided the district court with the following instructions:

> [We] remand to the district court for the entry of a judgment forfeiting the entire farm, unless the district court on remand determines that the forfeiture of the entire farm amounts to a constitutionally excessive fine under the Eighth Amendment, in which case the district court should enter such judgment of forfeiture as it deems in accord with the Constitution.

Id. at 825.

On remand, the district court held a hearing and took additional evidence. At the conclusion of the hearing, the district court ruled from the bench, declaring no forfeiture whatsoever in this case. The district court first noted that it would have ordered probation in this case had it found a basis to do so under the Sentencing Guidelines, but because it found no basis for departure, it was required to sentence Susan Bieri to 51 months of imprisonment and Leonard Bieri to 57 months. In the district court's opinion, these terms of imprisonment are "enough penalty for the criminal activity associated with the property." (Hr'g Tr., Dec. 20, 1994, at 87.) The district court found it significant that the property was used as a residence as well as a business and that two minor children "are dependent somewhat upon that residence." (Id.) In conclusion, the district court stated as follows:

> I don't know why the Eighth Circuit sent the case back. There's no evidence as to the value of any particular tract -- there were four tracts. Tract four where the house and barn was [sic] located was forfeited at the time of sentence and I felt that was appropriate because that's where the drugs were being stored. Obviously that was not appropriate. As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it.

> It's the judgment of the Court that no forfeiture of the defendants' farm be declared in this case.

(*Id.* at 88-89.) The following day, the district court filed a written order supplementing the findings made at the hearing. In the written order, the district court found "that the reasonable value of the defendants' farm is not less than $245,000," and "that it would be in the best interests of the children that they be permitted to remain at the residence which is located on the farm." (Appellant's App., Tab S, at 79.)

The government appeals, contending that the district court failed to follow the instruction of our prior opinion either to forfeit the whole farm, or in the alternative, to forfeit such portion of the farm as the Constitution will allow upon express factual findings supporting a determination that forfeiture of the whole would constitute an excessive fine.

II. Discussion.

The express basis for the district court's decision to order no forfeiture upon remand was the district court's determination that forfeiture is discretionary, akin to the decision of whether to award a statutory fine. We do not agree with this assessment.

To determine whether property is forfeitable under 21

U.S.C. § 853(a)(2),[1] the district court's only inquiry is whether the defendant used the property "in any manner or part" to commit or to facilitate a drug trafficking offense. If so, criminal forfeiture under this statute is mandatory, not discretionary. See 21 U.S.C. § 853(a) (mandating that the person "shall forfeit" and the court "shall order . . that the person forfeit to the United States all property described in this subsection"). The district court at sentencing clearly found that the Bieris used parts of their dairy farm to facilitate their drug trafficking offenses. Thus, the entire farm was forfeitable under section 853(a), and the mandatory language of the statute does not

---

1 Section 853(a) states in part as follows:

> (a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States . . .
>
> (1) any property constituting . . . proceeds . . .;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise . . . any interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.
>
> The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. . . .

21 U.S.C. § 853(a)(emphasis added).

leave forfeiture to trial court discretion. *See Bieri*, 21 F.3d at 824.

To sustain forfeiture of less than the whole in this circumstance, the Constitution imposes an additional layer of analysis. The Eighth Amendment prohibits the government from imposing excessive fines. The Supreme Court has plainly announced that criminal forfeiture, which is an *in personam* proceeding, is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Alexander*, 113 S. Ct. at 2775-76. Thus, courts must engage in a fact-intensive analysis under the Eighth Amendment Excessive Fines Clause to ensure that the forfeiture is not an excessive penalty, and courts may forfeit less than what the statute requires if necessary "to preserve the forfeiture by tailoring it to fit within the broad boundaries of constitutional proportionality." *Bieri*, 21 F.3d at 824.

Although the Supreme Court has declined to establish a multi factor test for determining when a fine is unconstitutionally excessive, *see Austin v. United States*, 113 S. Ct. 2801, 2812 (1993), our cases give some guidance. Preliminarily, "the defendant has the initial burden of making a prima facia showing of 'gross disproportionality.'" *United States v. Alexander*, 32 F.3d 1231, 1235 (8th Cir. 1994) (*Alexander II*) (quoting *United States v. Sarbello*, 985 F.2d 715, 724 (3d Cir.' 1993)) (other citations omitted). Second, "'the [E]ighth [A]mendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime.'" *Id.* at 1237 (alterations in original) (quoting *Sarbello*, 985 F.2d at 724).

To determine whether the facts indicate gross disproportionality, the district court must consider multiple factors, including the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited. *Id.* at 1235-36; *see also Bieri*, 21 F.3d at 824 (stating court must evaluate "all the circumstances of the illegal activity including the extent of the defendants' criminal drug activities and the amount of time that they conducted those activities"). "'Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct.'" *Alexander II*, 32 F.3d at 1236-37 (quoting *Sarbello*, 985 F.2d at 724). This multi factor approach does not provide an exhaustive list of factors, but it provides a helpful framework for analysis which will necessarily vary from case to case. *See id.* at 1237.

In the present case, as already noted, the district court on remand ordered no forfeiture at all. We must determine whether the district court properly performed an Eighth Amendment analysis to justify the order of no forfeiture. At the remand hearing, the district court stated that some factors to consider in determining whether or not a forfeiture is excessive are (1) the value of the property, (2) the criminal activity associated with the property, (3) the effect of property on innocent occupants, and (4) whether the property is used as a residence. (*See* Hr'g Tr., Dec. 20, 1994, at 86.) Thus, the district court expressly considered the Eighth Amendment analysis and made relevant fact-findings concerning the criminal sanctions imposed, the value of the farm, and its importance as

a residence for the Bieris' innocent minor children. The district court's order of no forfeiture, however, lacks an express conclusion that on the basis of these facts, forfeiture of the whole farm would constitute an excessive fine in violation of the Eighth Amendment. Rather, it rests upon a purported exercise of discretion which did not and does not exist. Based upon our review of the facts found by the district court and of the record, as articulated below, we hold that the district court's order of no forfeiture is not justified by the Eighth Amendment.

The record indicates that the extent and duration of the criminal conduct in this case was not minimal. The conspiracy to possess and to distribute marijuana lasted nearly two years, and the Bieris' farm, though not used solely for illicit purposes, was integral to the marijuana distribution conspiracy as it provided cover, storage, and a center of distribution for the illegal activity. Throughout this period, the Bieris distributed from their farm, or possessed at their farm with the intent to distribute, a total of 85 kilograms of marijuana, which had a wholesale price of $1,250 per pound. Thus, the wholesale value of marijuana involved in the conspiracy totaled approximately $233,750.

Weighing the gravity of the offenses against the severity of the criminal sanctions, we find no great imbalance. The Bieris do not deny that their offenses of conspiracy to distribute and to possess with intent to distribute a large amount of marijuana were significant. We note that their continuing criminal conduct was intentional and willful. The Bieris received sentences of imprisonment totaling 51 months for Susan and 57 months for Leonard, which were at the bottom of the applicable Sentencing Guidelines ranges. Together, the

Bieris were subject to fines of up to six million dollars, yet the district court imposed no fines.

The district court found that the value of the farm was worth no less than $245,000 at the time of the Bieris' arrest. This amount is roughly equal to the wholesale value of the marijuana that was brought to the farm or distributed from the farm during the life of the conspiracy ($233,750). We find this to be convincing evidence that forfeiture of the entire farm is not grossly disproportionate to the criminal conduct.

The district court evidently gave great weight to the impact of forfeiture on the Bieris' children. The Bieris urge us to consider the intangible value of the property, including the fact that it is a residence and that the forfeiture will have an adverse impact upon their two minor children, when considering the proportionality of the forfeiture, citing *United States v. One Parcel of Real Property Located at 9638 Chicago Heights, St. Louis*, 27 F.3d 327, 330-31 (8th Cir. 1994) (indicating in dicta that district court should consider that the property is a residence and the effect of forfeiture on innocent occupants and children). The government, on the other hand, argues that we ought not make value judgments based upon intangibles or different lawful uses of property.

We conclude that the dicta in *Chicago Heights* enumerating intangible factors, including the property's character as a residence or the effect of forfeiture on innocent occupants and children, may be relevant to the Eighth Amendment analysis in some cases. This may be true in civil *in rem* forfeiture cases where the owner has not been convicted of any crime. *See United States v. Real Property at 6625*

Zumierez Drive, 845 F. Supp. 725 (C.D. Cal. 1994) (forfeiture of residence was found to be excessive where property owner was acquitted of state criminal drug charges). However, especially in criminal *in personam* forfeiture, the property's character as a residence and the effect of forfeiture on innocent occupants are factors whose importance diminishes as the duration and extent of the defendant's culpability and use of the property to facilitate criminal conduct rises. "It is in the light of the extensive criminal activities which [defendants] apparently conducted through this [criminal] enterprise over a substantial period of time that the question of whether or not the forfeiture [is] 'excessive' must be considered." *Alexander*, 113 S. Ct. at 2775. Our multi factor approach to the proportionality analysis allows for this type of weighing and balancing, which will necessarily vary with the specific facts of each case.

In this case, both parents knowingly and willfully used the family dairy farm, including the residence of the children, to successfully conceal their marijuana distribution operation for nearly two years before their arrest. The effect of forfeiture certainly will be a hardship on the children. In reality, however, both parents are now in jail, and the children cannot remain on the farm by themselves. Children are not dependent on a residence, but on their parents. Here, the parents chose to engage in highly illegal conduct grossly inimical to the best interests of their children, purposefully using the children's home to do so. Their current concern for the children's best interests rings hollow given their prior willingness to use the children's home with the children living in it as a wholesale drug distribution center. While we have no doubt that the children are very attached to the farm, we cannot consider the intangible value of the farm in isolation from the culpability of both

parents. We conclude that the parents' culpability in this case far outweighs the intangible value of the property and that the adverse effect of forfeiture on the children does not render the forfeiture unconstitutionally excessive.

We bear in mind that the essential inquiry for purposes of *in personam* criminal forfeiture is "whether the value of the property being forfeited is an excessive monetary punishment in relation to the offense giving rise to the forfeiture." *United States v. Wild*, 47 F.3d 569, 675 (4th Cir.), *petition for cert. filed*, (U.S. May 18, 1995) (No. 94-9553). The record does not support the Bieris' assertion of gross disproportionality arising from the forfeiture of their whole farm, and allowing the government to extract a fine in the amount of this forfeiture is not "'more criminal than the crime.'" *Alexander II*, 32 F.3d at 1237 (quoting *Sarbello*, 985 F.2d at 724). In our view, it cannot be excessive in a constitutional sense to take tainted property from criminals when that property is roughly equal in value to the total dollar volume of the criminal activity the criminals conducted or facilitated by using the property, and which property is worth far less than the legislatively authorized statutory fines. *See United States v. Myers*, 21 F.3d 826, 830 (8th Cir. 1994) (noting that, given the broad language of § 853(a) and large monetary fines authorized by Congress, "a successful proportionality challenge to criminal forfeiture will be a rare occasion"), *cert. denied*, 115 S. Ct. 742 (1995); *see also United States v. Libretti*, 38 F.2d 523, 521 (10th Cir. 1994) (holding forfeiture within statutory fine not excessive), *cert. granted*, 115 S. Ct. 1398 (Mar. 27, 1995) (No. 94- 7427).

III. Conclusion.

The district court's decision not to forfeit the farm was not justified by the district court's findings of fact or by the Eighth Amendment. We conclude that forfeiture of the entire farm is required by section 853(a)(2), and that this forfeiture is not an excessive fine in violation of the Eighth Amendment. Accordingly, we reverse the order of the district court and remand, directing the district court to enter an order declaring forfeiture of the entire farm.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. In the first appeal of this case we remanded to the district court with directions to conduct an analysis under the excessive fines clause of the Eighth Amendment with respect to the forfeiture of the farm. It is evident that the district court's order does not do so. I would simply remand to the district court once again with directions to conduct such an analysis. I do not believe that our court should conduct such an analysis on the record before us. I think the district court's analysis should take into consideration the inquiry outlined in *United States v. Alexander*, 32 F.3d 1231, 1235-37 (8th Cir. 1994), and *United States v. 9638 Chicago Heights*, 27 F.3d 327, 331 (8th Cir. 1994).

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 92-03044-01/02-
	)	CR-S-4
SUSAN D. BIERI, and	)	
LEONARD BIERI, III,	)	
	)	
Defendants.	)	

ORDER

As a supplement to the findings made by the Court following a hearing on the forfeiture of the Bieris' farm, the Court finds that the reasonable value of the defendants' farm is not less than $245,000.00.

The Court further finds that it would be in the best interests of the children that they be permitted to remain at the residence which is located on the farm.

IT IS SO ORDERED.

RUSSELL G. CLARK, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Date: December 21, 1994

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUSSELL G. CLARK
UNITED STATES DISTRICT JUDGE
December 20, 1994

•••

THE COURT: Well, apropos to Mr. Monroe's statement that there is no definitive case law relative to the matter to be considered in the case of a forfeiture may be correct but in the 9638 Chicago Heights case,, while it may be a dicta, in my opinion the Eighth Circuit very clearly stated some of the matters which should be considered by the trial court in considering a forfeiture and as to whether or not the forfeiture involved an excessive fine and was unconstitutional.

Those factors are the value of the property, the criminal activity associated with the property, the effect of property on innocent occupants and whether or not the property is used as a residence. Then it went on and said or may consider other factors which might be required.

Now, I've read the sentencing transcript and at the time of the sentence I very specifically stated if I were writing from a clean slate I would probably put the defendants on probation. Under the sentencing guidelines I did not think there was any basis for a downward departure -- we're not talking about sentencing now, we're talking about forfeiture -- but this is one of the matters that I can look at in regard to the issue of forfeiture.

Mr. and Mrs. Bieri have lived almost three years on bond without any criminal incidents and this, to a great extent, confirms what I stated at the time of sentencing, that if I were

writing from a clean slate that I would probably put them on probation.

Now, in regard to the criminal activity associated with the property, Susan Bieri was sentenced to 51 months, Leonard Bieri was sentenced to 57 months. This is enough penalty for the criminal activity associated with the property. I don't think there's any question but what -- well, the property was used as a residence, but any farm residence is connected with a business, whatever the agricultural activity might be, but it's still a residence, and there's absolutely no question but what we have two minor children that are dependent somewhat upon that residence.

Also at the time of sentencing I did not impose a fine, not because of the forfeiture, but -- and in the commitment order I very specifically stated no fine was imposed because the defendants were not financially able to pay a fine, and in the sentencing transcript I did not say that no fine was being imposed merely because of forfeiture. I said there was a forfeiture and that any balance of the property needed -- any balance of the property was needed. That's the most that I said.

Now, I have read the law review article which the defendants and their attorneys attached to some of their pleadings. I've read it in their entirety. It's a matter that should be sent to the United States Congress and to the Sentencing Commission and not to the sentencing court. I agree with it wholeheartedly. Not only when you sentence parents you sentence children, and Mr. and Mrs. Bieri should have been thinking about that when they were involved in criminal activity.

So even though I know the two children will suffer greatly from the fact that their parents are incarcerated, that's a decision that they made.

Now, the statement that Mr. Monroe made at the time of the criminal activity the defendants made their property forfeitable, that may be correct, but they also came up with a 51- and 57- month sentence.

I don't know why the Eighth Circuit sent the case back. There's no evidence as to the value of any particular tract -- there were four tracts. Tract four where the house and barn was located was forfeited at the time of sentence and I felt that was appropriate because that's where the drugs trafficking occurred, that's where the drugs were being stored. Obviously that was appropriate. As a normal rule, any time a fine is imposed within the statute or no fine is imposed, it's discretionary with the trial court. I don't know whether that's true in regard to a forfeiture or not but I'm going to test it.

It's the judgment of the Court that no forfeiture of the defendants' farm be declared in this case.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 3, 1994

Mr. James R. Wyrsch
1101 Walnut St., 13th Floor
Kansas City, MO 64106-2122

Re: Susan Bieri and Leonard D. Bieri, III
v. United States
No. 94-284

Dear Mr. Wyrsch:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2157/2372/2373WMS

United States of America,	*	
	*	
Appellee/Cross-Appellant,	*	Order Denying Petition for Rehearing
	*	and Suggestion for
vs.	*	Rehearing En Banc
	*	
Susan Bieri and Leonard Bieri,	*	
	*	
Appellants/Cross-Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 20, 1994

Order Entered at the Direction of this Court:

(/S/ Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 93-2373

United States of America, *
*
Plaintiff - *
Appellant, *
*
v. *
*
Susan D. Bieri, *
*
Defendant- *
Appellee. *

Submitted: November 8, 1993
Filed: April 13, 1994

Before HANSEN, Circuit Judge, JOHN R. GIBSON,* Senior Circuit Judge, and JACKSON,** District Judge

HANSEN, Circuit Judge.

*The HONORABLE JOHN R. GIBSON was an active judge of this circuit at the time this case was submitted and took senior status on January 1, 1994, before the opinion was filed.

**The HONORABLE CAROL E. JACKSON, United States District Judge for the Eastern District of Missouri, sitting by designation.

Susan and Leonard Bieri appeal the district court's order of criminal forfeiture pursuant to 21 U.S.C. § 853(a)(2) of what we shall refer to as "tract four" of the Bieris' four-tract dairy farm, and the government cross-appeals. The Bieris contend that the district court erred by (1) applying the wrong standard of proof to determine forfeitability, (2) using improperly obtained evidence to support the order of forfeiture, and (3) failing to consider proportionality under the Eighth Amendment. On cross-appeal, the government contends that the district court erred in ordering forfeiture of only one tract of the farm. We affirm in part and reverse in part.

I. BACKGROUND

In this case, we address the Bieris' appeal of the district court's order of criminal forfeiture. In a separate opinion which we also file today, we affirm the Bieris' criminal convictions and set forth in detail the facts upon which the district court convicted the Bieris of criminal drug charges. *See United States v. Bieri*, Nos. 93-1870 & 93-1872, slip op. at 2-3 (8th Cir. Mar., 1994). We will repeat here only those facts necessary for resolution of the forfeiture issues.

Susan and Leonard Bieri acquired a dairy farm by warranty deed in January of 1984. The single deed describes four tracts of real property; three of the tracts are located in Taney County, Missouri, and one in Ozark County, Missouri. (Appellants' App. at 66.) The four tracts are contiguous. The farm's house and outbuildings are located in tract four.

In January of 1992, law enforcement officers obtained and executed a search warrant for the Bieris' farm. Pursuant to the

warrant, the officers seized approximately 141 pounds of marijuana, cash, a loaded gun, brown wrapping material, and other drug paraphernalia, all found in the house and outbuildings on tract four. Subsequently, a grand jury indicted Susan and Leonard by a superseding indictment on charges of conspiracy to possess with intent to distribute marijuana, possession with intent to distribute marijuana, use of a firearm in relation to a drug trafficking offense, and forfeiture of their farm which was alleged to have been used to commit or to facilitate drug trafficking. The Bieris moved to suppress the evidence obtained as a result of the search, but the district court overruled the motions. Following a bench trial, the district court acquitted the Bieris of the firearm charges and convicted them of conspiracy to possess with intent to distribute marijuana. The district court found by a preponderance of the evidence that the Bieris had used their property to facilitate drug trafficking. At the sentencing hearing, the district court ordered forfeiture only of tract four of the farm containing the house and outbuildings. The Bieris appeal, and the government cross-appeals, the order of forfeiture.

II. DISCUSSION

The Bieris first argue that the district court erred in applying a preponderance of the evidence standard to determine that the Bieris used their property for drug trafficking, rather than requiring the government to prove that fact beyond a reasonable doubt.

We begin our analysis with the language of the statute because the applicability of the reasonable doubt standard depends upon how the Congress has defined the offense. *McMillan v.*

Pennsylvania, 477 U.S. 79, 85 (1986). It is a fundamental principle that due process requires the government to prove guilt in a criminal proceeding beyond a reasonable doubt as to each element of an offense. *See In re Winship*, 397 U.S. 358, 361-64 (1970). A sentencing sanction, however, comes into play only after the defendant has been found guilty of an offense beyond a reasonable doubt, and a factor used to determine the sentence does not itself invoke the right to proof beyond a reasonable doubt. *See McMillan*, 477 U.S. at 86; *United States v. Galloway*, 976 F.2d 414, 425 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1420 (1993). *See also United States v. Coleman*, 990 F.2d 419, 421 (8th Cir. 1993) (prove factual prerequisites to sentence enhancement by a preponderance of the evidence). The language of section 853(a) indicates that Congress intended criminal forfeiture of property to be a punishment and the use of the property to commit or to facilitate a drug trafficking offense to be its factual underpinning, and not a separate offense. Section 853(a) states in part as follows:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law
>
> —
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be

> used, in any manner or part, to commit, or to facilitate the commission of, such violations;...
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> • • • •
>
> The court, in imposing sentences on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection....

21 U.S.C. § 853(a).

Section 853(a) does not explicitly state what standard of proof is required for criminal forfeiture. Section 853(a) expressly states, however, that it shall apply to persons convicted of a drug offense and that in imposing sentence on such a person, the court must, "in addition to any other sentence imposed," order forfeiture of all property described in section 853(a). 21 U.S.C. § 853(a); *see also United States v. Elgersma*, 971 F.2d 690, 692-93 (11th Cir. 1992) (en banc). Congress has clearly designated criminal forfeiture as part of the sentencing or punishment phase of a criminal proceeding and has given no indication that a higher standard of proof applies than normally applies at sentencing. Thus, although charged as a count in the indictment, criminal forfeiture is neither an element of a criminal offense nor a criminal offense itself. Therefore, proof beyond a reasonable doubt is neither constitutionally nor statutorily mandated. *See Elgersma*, 971 F.2d at 693-94.

Furthermore, section 853(d) creates a rebuttable pre-

sumption that property is subject to criminal forfeiture "if the United States establishes by a preponderance of the evidence that" the defendant acquired the property during the period of the drug violation or within a reasonable time thereafter and that there was no likely source for the property other than drug proceeds. "This presumption would have no significance if the government was still required to prove forfeiture beyond a reasonable doubt" of property acquired by drug proceeds under section 853(a)(1). *Elgersma*, 971 F.2d at 694. The presumption of section 853(d) is a clear indication that Congress intended criminal forfeiture under section 853(a)(1) (property acquired with drug proceeds) to be proven by a preponderance of the evidence. There is no similar presumption or statement of the burden of proof relating to section 853(a)(2) (property used to facilitate a drug crime) which applies to the Bieris' case. Nevertheless, it is significant that section 853 gives no indication that Congress intended a higher standard of proof for property used to commit or to facilitate a drug crime under section 853(a)(2) than is required for property acquired with the proceeds of a drug violation under section 853(a)(1). Absent either a constitutional requirement or statutory language indicating a higher burden of proof, there is simply no principled distinction between the two types of forfeitable property that would justify a higher burden of proof to forfeit property used to facilitate a drug crime than is required to forfeit property acquired with drug proceeds. The defendant's putative property rights in both kinds of property are identical. "No federal court of appeals...has construed section 853 to differentiate between proceeds of the offense and other property on the burden of proof necessary for forfeiture." *United States v. Smith*, 966 F.2d 1045, 1051 (6th Cir. 1992) (a § 853(a)(2) case).

Other circuits that have considered the issue have held that the preponderance of the evidence standard is the proper standard in criminal forfeiture cases. *See Elgersma*, 971 F.2d at 694-97; *Smith*, 966 F.2d at 1052; *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987). We agree. Accordingly, we conclude that the district court did not err in determining the forfeitability of the Bieris' property by using a preponderance of the evidence standard.

The Bieris contend that this court's statement in *United States v. Wiley*, 997 F.2d 378, 384 (8th Cir.), *cert. denied*, 114 S. Ct. 600 (1993), that "[o]ur standard for reviewing the jury's finding of forfeiture is whether, in the light most favorable to the prosecution, any reasonable jury could have found the property forfeitable beyond a reasonable doubt," is controlling. We disagree. We find that this statement has been severely undercut by two United States Supreme Court cases filed the same day that we filed *Wiley*.[1] *See Alexander v. United States*, 113 S. Ct. 2766 (1993); *Austin v. United States*, 113 S. Ct. 2801 (1993). In *Alexander*, the Supreme Court stated that criminal forfeiture "is clearly a form of monetary punishment" and should be analyzed under the Excessive Fines Clause of the

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1 We also note that the *Wiley* court offered no analysis to justify the standard articulated, and more importantly, the standard of proof was not at issue in *Wiley*. The *Wiley* court merely applied the standard of proof that the district court had applied, and that standard was no questioned on appeal.

Eighth Amendment.[2] 113 S. Ct. at 2775-76. In *Austin*, the Court held that civil forfeiture also is a form of punishment subject to Eighth Amendment limitations of the Excessive Fines Clause. 113 S. Ct. at 2812. These cases clearly indicate that forfeiture, either criminal or civil, is intended to be a form of punishment akin to a sentencing enhancement, and not a separate offense. Thus, our statement in *Wiley* can no longer be binding authority on the correct burden of proof in forfeiture cases, if it ever was.

The Bieris next argue that the forfeiture is improper because the district court erroneously relied on evidence obtained pursuant to an invalid search warrant to support the order of forfeiture. Because we conclude today in the Bieri's criminal appeals that the anticipatory search warrant was valid, this argument fails. *See Bieri*, Nos. 93-1870 & 93-1872, slip op. at 3-8.

The Bieris' final argument, concerning the proportionality of the forfeiture, is intertwined with the government's

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2 Alexander involved forfeiture under the Racketeer Influenced and Corrupt Organizations Act (RICO), pursuant to 18 U.S.C. § 1963(a). This statute requires in part that "[t]he court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection." 18 U.S.C. § 1963(a). This language is identical to that found in 21 U.S.C. § 853(a). Thus, we conclude that the same Eighth Amendment Excessive Fines analysis applies for criminal forfeiture under 21 U.S.C. § 853(a). We note, however, that while a portion of the forfeiture language is the same, RICO does not contain any provision like § 853(d), and the statutory analogy cannot be completely carried over to the burden of proof. *See United States v. Pelullo*, 14 F.3d 881, 902-03 (3d cir. 1994). We also note a different legislative history for the drug forfeiture statute. *See id.* at 903.

contention on cross-appeal that the district court erred in forfeiting only one tract of the farm. Before addressing the proportionality of the forfeiture, we must define what portion of the Bieris' farm is "property" subject to forfeiture under section 853. The government contends that the district court should have forfeited the entire farm, and the Bieri's contend that the district court correctly considered the farm as four separate tracts and only forfeited one of them.

Section 853(a) states in relevant part that a person convicted of a drug offense "shall forfeit to the United States... any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a drug offense. 21 U.S.C. § 853(a)(2). "By specifying that property is subject to forfeiture if it was used 'in any manner or part' to commit or facilitate a drug offense, Congress plainly provided for forfeiture of property even where only a portion of it was used for the prohibited purposes." *United States v. Littlefield*, 821 F.2d 1365, 1367 (9th Cir. 1987). Thus, if a defendant uses any part of a piece of property to commit or to facilitate a drug offense, the district court is required to forfeit the whole property. *See Smith*, 966 F.2d at 1053.

There remains some uncertainty in spite of the clear language of the statute does not clearly define what constitutes one piece of "property." Congress provided only minimal guidance, stating that a liberal construction of section 853 is necessary "to effectuate its remedial purposes." 21 U.S.C. § 853(o). The Sixth Circuit in *Smith* held that a four-tract farm should be treated as four separate properties because the property consisted of four separate tracts purchased in four separate instruments of transfer executed on four separate

dates. 966 F.2d at 1054. The *Smith* court found that the natural source for defining "property" subject to forfeiture is the instrument creating the defendant's interest in the property. *See id.* at 1053; *see also United States v. Reynolds*, 856 F.2d 675, 676-77 (4th Cir. 1988) (same analysis under civil forfeiture statute). We agree. Although the owner may view a single piece of property as separable tracts, the owner's subjective characterization of the property cannot serve as the basis for determining what constitutes "property" under section 853. *See Smith*, 966 F.2d at 1053. We adopt the Sixth Circuit's rule that "tracts of real property subject to forfeiture under section 853 are defined by the instruments and documents that created the defendant's interest in the property." *Id.* at 1054.

Unlike Smith, who acquired his four-tract farm in four separate instruments, the Bieris acquired all four tracts comprising their farm as a single unit in a single deed. The deed describes four individual but contiguous tracts of real property, historically described as separate tracts but owned and conveyed as a single unit even before the Bieris' purchase of the property. The historical description of the property, like the owner's subjective characterization of the property, is inapposite. The critical facts are that the Bieris purchased the property as a whole, at a single time, that it was conveyed to them in one instrument, and that the property is contiguous. These facts indicate that the property is in fact a single unit for purposes of section 853(a), and this interpretation is consistent with the congressionally mandated liberal construction and remedial purpose of section 853(a). *See* 21 U.S.C. § 853(o). We conclude that section 853(a) required the district court to forfeit the whole farm, and therefore, the district court erred in

forfeiting only tract four.[3]

Finally, we address the Bieris' constitutional claim that the forfeiture of their property amounts to an excessive fine and cruel and unusual punishment in violation of the Eighth Amendment. The Eighth Amendment's prohibition against cruel and unusual punishment does not apply in the context of criminal forfeiture. *See Alexander*, 113 S. Ct. at 2775 (Cruel and Unusual Punishment Clause is concerned with the durations and conditions of confinement). However, the Eighth Amendment's prohibition against excessive fines applies because a criminal forfeiture is a "fine" for purposes of the Excessive Fines Clause. *Id.* at 2775-76. Accordingly, courts must consider the proportionality of the forfeiture, which requires a fact-specific evaluation of all the circumstances of the illegal activity including the extent of the defendants' criminal drug activities and the amount of time that they conducted those activities in order to determine whether the forfeiture was unconstitutionally "excessive." *See id.* at 2776. If the district court determines that the forfeiture constitutes an unconstitutionally excessive fine given the specific facts of a particular case, the district court may then order forfeiture of less than the

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3 The dissent's call to have a particularized finding of fact as to what "portion" of the entire farm was used to facilitate the drug dealing in order to define what property is forfeitable would render meaningless the Congress's mandate that the whole of the property should be forfeited if used "in any manner or part" for illegal purposes. 21 U.S.C. § 853(a)(2). As the dissent points out, the record already contains the trial court's findings that "I don't think there's any question whatsoever but what this farm was being used to facilitate drug trafficking." (Trial Tr. at 139.) In our view, the dissent fails to distinguish between what property Congress has declared to be forfeitable by statute and what property the Constitution will allow to be forfeited in any particular case.

whole in an effort to preserve the forfeiture by tailoring it to fit within the broad boundaries of constitutional proportionality.

The Bieris argue that their criminal activity was not extensive, that it did not encompass a substantial period of time, and that only a minimal relationship existed between the property and their criminal offenses. The district court's order of forfeiture does not contain any findings of fact on the proportionality issue. Although the district court ordered forfeiture of only one tract of the forfeitable property, the court did not indicate that it engaged in a proportionality analysis that required this result. In order for this court to provide a meaningful review, the district court must make express findings of fact to support its proportionality analysis. The district court may order forfeiture of less than the whole farm only upon express factual findings supporting a determination that, based upon all of the circumstances of the case including the extent and length of the defendant's drug activity, forfeiture of the whole would be an excessive fine. We remand with instructions for the district court to expressly consider and determine the excessive fine issue.

III. CONCLUSION

The district court did not err in applying a preponderance of the evidence standard to determine that the Bieris' farm was forfeitable. The district court erred, however, by ordering forfeiture of only tract four of the four-tract farm, which was purchased in a single instrument as a single contiguous unit of property, without engaging in a proportionality analysis. Accordingly, we reverse the order of forfeiture and remand to the district court for the entry of a judgment forfeiting the entire

farm, unless the district court on remand determines the forfeiture of the entire farm amounts to a constitutionally excessive fine under the Eighth Amendment, in which case the district court should enter such judgment of forfeiture as it deems in accord with the Constitution.

JOHN R. GIBSON, Senior Circuit Judge, concurring in part and dissenting in part.

I agree with the court that the preponderance of evidence standard is proper in criminal forfeiture cases and that a proportionality analysis must be made. The district court understandably did not make such an analysis, as *Alexander v. United States*, 113 S. Ct. 2766 (1993), and *Austin v. United States*, 113 S. Ct. 2801 (1993), were not decided at the time of the district court's forfeiture decision. I respectfully dissent, however, on what constitutes "property" and the extent of forfeiture appropriate in this case. The court errs in looking only to the document conveying title to determine "property" for the purpose of forfeiture.

The court adopts the Sixth Circuit's rule in *Smith* that a court should look at the instrument or documents creating the property interest to determine whether the property is a single unit or divisible. *See* 966 F.2d 1045, 1053 (6th Cir. 1992). *Smith* is much different than the case before us today. The Smiths initially acquired the land through four separate conveyances. *Id.* at 1054. Upon the Smith's divorce, the wife conveyed her interest in the four tracts to her husband by a single quit claim deed. *Id.* The court found that the transfer by quit claim deed did not create Mr. Smith's interest, but rather that he obtained the property through four separate deeds. *Id.*

The district court then ordered only one tract forfeited. *Id.* at 1055-56.

Although the Bieris acquired all four tracts to their farm through a single general warranty deed, the deed described the four tracts separately, as tract one, tract two, tract three and tract four. Tracts two, three and four are located and taxed in Taney County, Missouri, and tract one is located and taxed in Ozark County, Missouri. In Missouri, land must be recorded in the real estate records of the county where it is located. *See* Mo. Rev. Stat. § 59.400 (1986 & Supp. 1993). Further, real property is taxed by the county of its situs. *See* Mo. Rev. Stat. § 137.010-137.960 (1986 & Supp. 1993) (Assessment and Levy of Property Taxes). In this case we should not look only to the deed or conveyance to determine whether the Bieris' farm, consisting of four tracts, is a single piece of property for forfeiture purposes. The question of whether the tracts are divisible for purposes of forfeiture is a factual issue, and indeed is intertwined with the proportionality issue.

I believe we should remand to the district court to consider several factual issues before ordering the forfeiture. First, the district court should determine whether the entire farm, certain tracts or only portions of certain tracts were "used, or intended to be used, in any manner or part, to commit, or facilitate the commission of" the drug trafficking. *See* 21 U.S.C. § 853. Although the record contains findings of fact by the district court that the farm was used to facilitate the drug trafficking, the court at sentencing ruled only that tract four be forfeited. I believe specific facts must be developed to demonstrate the extent of use of each of the tracts in the drug operation. The record is lacking in factual findings regarding which tract or

tracts facilitated the drug trafficking.

For example, the record shows that Ruiz delivered marijuana to the house and that drugs were stored in the barn. Both the house and barn are located on tract four. The government introduced evidence that it was necessary to drive over other tracts to reach the house. In *Smith*, the court held that real property used to conceal the commission of an offense created a sufficient nexus to find that it facilitated the drug trafficking. 966 F.2d at 1055-56. Here, the district court should consider whether the other tracts concealed or in any other way facilitated the Bieris' drug trafficking operation, and make detailed findings of fact in determining which tracts should be forfeited.

I would reverse the order of forfeiture and remand to the district court with instructions to make additional findings of fact and to enter an order of forfeiture for the tract or tracts of the Bieris' farm that facilitated their drug trafficking.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	) No.
	) 92-03044-01/02-CR-
	)S-4
SUSAN D. BIERI,	)
and	)
LEONARD BIERI, III,	)
	)
Defendants.	)

ORDER OF FORFEITURE

Based upon the evidence adduced and the declaration of Forfeiture entered previously in the above-styled case, and for the reasons stated at bar, it is hereby

ORDERED, ADJUDGED AND DECREED that pursuant to 21 U.S.C. §§ 846, 841(a)(1), and 853(a), the following property is hereby condemned and forfeited to the United States of America:

All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, described as:

TRACT NO. 4 (TANEY COUNTY, MISSOURI) The

Northeast quarter of Section 24 and nine acres off of the Southwest Quarter of the Southeast Quarter of Section 13 beginning at the Southwest corner thereof thence North 145 yards, thence due East 165 yards, thence diagonally to the Southeast corner of said Southwest Quarter Southeast Quarter thence West 1/4 mile to place of beginning, all in Township 24, Range 17 and aggregating 169 acres more or less.

The Court finds that the above-listed forfeited asset constitutes property that was used or intended to be used, in some manner or part, to commit or facilitate the commission of the aforementioned violation.

It is further ORDERED that the above-listed property shall be seized forthwith by the United States Marshal for the Western District of Missouri or his duly authorized representative and disposed of in accordance with the law.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the United States Marshal is hereby ORDERED to record forthwith a copy of this Order in each county where the above-described real property is located, and which Order, when recorded, shall be notice to any transferee or potential transferees, of the interest of the United States of America therein.

2. That all of the aforementioned forfeited property is to be held by the United States Marshal's Service in their secure custody and control.

3. That pursuant to 21 U.S.C. § 853(n)(1), the United States Marshal forthwith shall publish at least once for three successive weeks in a newspaper of general circulation, notice of this Order, notice of the Marshal's intent to dispose of the property in such manner as the Attorney General may direct and notice that any person, other than the defendant, having or claiming a legal interest in the above-listed forfeited property must file a petition with the Court within thirty (30) days of final publication of notice or of receipt of actual notice, whichever is earlier.

This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in the forfeited property and any additional facts supporting the petitioner's claim and the relief sought.

4. The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the Order of Forfeiture, as a substitute for published notice as to those persons so notified.

5. That upon adjudication of all third party interests, this Court will enter a Final Order of Forfeiture pursuant to 21 U.S.C. § 853(n), in which all interests will be addressed.

ORDERED this 22nd day of April, 1993

RUSSELL G. CLARK
Senior United States
District Judge